

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON
No. 33662

STATE OF WEST VIRGINIA,

Appellee,

vs.

MONONGALIA COUNTY CIRCUIT COURT
CASE NO. 05-F-69

JAMES LEE BROOKS,

Appellant.

**STATE'S BRIEF IN RESPONSE TO
APPELLANT'S CLAIM OF ERROR**

**Marcia L. Ashdown
Monongalia County Prosecuting Attorney
Monongalia County Courthouse
243 High Street, Room 323
Morgantown, WV 26505
(304) 291-7250**

Counsel for Appellee

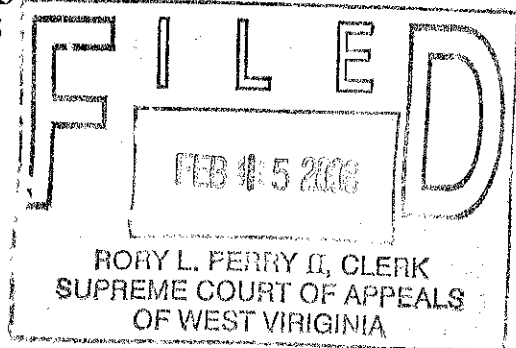


TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF AUTHORITIES | ii |
| I. NATURE OF CASE – STATEMENT OF FACTS..... | 1 |
| II. ARGUMENT..... | 2 |
| III. CONCLUSION..... | 12 |
| CERTIFICATE OF SERVICE..... | 13 |

TABLE OF AUTHORITIES

CASES FROM OTHER JURISDICTIONS:

| | |
|---|------------|
| <i>State v. Randolph</i> , 876 P.2d. 177 (Kan. 1994)..... | 2, 3, 4, 5 |
| <i>State v. Day</i> , 911 A.2d 1042 (R.I. 2006)..... | 5, 11 |
| <i>Rocha v. State</i> 506 S.E. 2d. 192, (Ga. 1998)..... | 5 |
| String citations | 5 |
| <i>Knotts v. State</i> , 686 So.2d. 431 (Ala.Crim.App. 1995) <i>People v. Hamilton</i> , 78 Ill.App.3d. 1031, 34 Ill.Dec. 358, 398 N.E.2d. 33 (1979) <i>Pharms v. State</i> , 477 N.E.2d. 334 (Ind.Ct.App. 1985) <i>State v. Randolph</i> , 19 Kan.App.2d. 730, 876 P.2d. 177 (1994) <i>Osborne v. Commonwealth</i> , 43 S.W.3d. 234 (Ky. 2001) <i>Johnson v. State</i> , 512 So.2d. 1246 (Miss. 1987) <i>State v. Davis</i> , 988 S.W.2d. 68 (Mo.Ct.App. 1999) <i>State v. Garcia</i> , 93 N.M. 51, 596 P.2d. 264 (N.M. 1979) | |
| <i>State v. Darden</i> , 12 S.W.3d 455 (Tenn. 2000)..... | 6 |
| <i>Gibson v. State</i> , 177 N.W.2d. 912 (Wis. 1970)..... | 9 |
| <i>Blythe v. State</i> , 268 Ind. 97, 373 N.E.2d. 1098 (1978)..... | 10, 11 |

STATUTES:

| | |
|---------------------------|--|
| W.Va. Code §49-5-2 | |
| W.Va. Code §49-5-10 | |
| W.Va. Code §49-5-10(a) | |
| W.Va. Code §49-5-10(j) | |
| W.Va. Code §49-5-10(d)(2) | |

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 33662

STATE OF WEST VIRGINIA, Appellee,

v.

JAMES LEE BROOKS, Appellant,
Below

STATE'S BRIEF IN RESPONSE TO APPELLANT'S CLAIM OF ERROR

I. Nature of Case – Statement of Facts

The Appellant was originally charged by a juvenile delinquency petition for the offense of First Degree Robbery by violence, stemming from an incident that occurred on February 12, 2005, in which the appellant and two other juveniles, acting in concert, attacked a man and beat, kicked, stomped, and robbed him. Extremely serious injuries were inflicted upon the victim, and it was expected that he would soon die in Ruby Hospital. The details of that scenario were presented at each of the Appellant's hearings as a juvenile, including the detention hearing, the preliminary hearing and the juvenile transfer hearing.¹ By May 2005, when the case was submitted to the grand jury, the victim had not died. He was alive, but deeply comatose. At the time of trial, eight months after the attack, the victim remained in a persistent vegetative state.²

After the Appellant was transferred to adult status³ he was indicted by Grand Jury on May 13, 2005, for First Degree Robbery, Conspiracy to Commit First Degree Robbery, Malicious Assault, and Conspiracy to Commit Malicious Assault. The additional three charges

¹ All three juveniles, each close to eighteen years of age when they attacked the victim, were transferred to adult court in separate juvenile proceedings.

² The victim remains in a persistent vegetative state even now and is not expected to emerge from that condition.

³ The Appellant was transferred to adult status pursuant to W.Va. Code §49-5-10(d)(2). The criteria for transfer under that section of law requires the the Appellant to have been previously adjudicated delinquent for an offense of felony violence to the person, and that the new offense be one of felony violence to the person.

were all for offenses related to and arising from first degree robbery by violence, which the Appellant committed with his co-defendants.

At a pre-trial hearing held on October 24, 2005, the Appellant presented his motion to dismiss counts two, three and four of the indictment, arguing that he had been transferred to adult status on the robbery charge alone, and that the circuit court did not have jurisdiction to try him on the additional counts. The trial court carefully considered the legal arguments and authority submitted by both the Appellant and the State, and denied the motion to dismiss.

At trial, police officers, eyewitnesses to the attack, and a friend of all three of the defendants testified. The friend, to whose home the three had run immediately after the attack, heard their comments and observed them washing off their shoes in a downstairs shower. The three left his house only moments before police, who had been tracking them through the snow, arrived. The Appellant did not testify at his trial. His self-serving claims that he did not participate in the attack included in the Appellant's brief, were not presented to the jury and are not supported by the evidence. The Appellant was convicted on all four counts of the indictment.

II. Argument

The trial court correctly ruled that the Appellant was transferred to the personal as well as subject matter jurisdiction of the criminal court. That ruling is supported by the majority of courts in sister jurisdictions and comports with constitutional protections and a common-sense approach to statutory interpretation.

The Appellant points out that his claim of error is one of first impressions for this Court. Although that is apparently true, this Court may look to other courts for examples of how the issue has been resolved in other states.

As acknowledged by the Appellant, in *State v. Randolph*, 876 P.2d. 177 (Kan. 1994), the prosecution was not required to return to juvenile court, after a juvenile had been waived to adult

jurisdiction, to file additional charges against the juvenile that were not presented in juvenile court. In that case the state charged the juvenile with one count of attempted aggravated robbery and filed a motion to transfer him to adult status. After transfer, the prosecutor filed a three-count criminal complaint against Randolph, charging him as an adult with one count of aggravated battery and one count of robbery, along with the original charge of attempted aggravated robbery.

At his trial, after objecting to the two additional felony charges, Randolph was found guilty of aggravated battery and not guilty on the original charges of attempted aggravated robbery and robbery. He subsequently argued on appeal that the trial court had allowed the state to improperly file two additional charges against him after he appeared in adult criminal court. The Kansas court held that once the juvenile court decides to transfer a juvenile to criminal court, the criminal court acquires personal and subject matter jurisdiction over the case. Therefore, the criminal court may try any additional charges that might arise from the same set of facts that spawned the juvenile case.

In reaching the decision in *Randolph*, supra, which presented a question of first impression, the Kansas court recognized that courts in other jurisdictions had ruled upon the issue in two different ways. One group (the distinct minority) holds that jurisdiction over juveniles, both personal and subject matter, is strictly within the discretion of the juvenile court. Thus, the juvenile court must specifically authorize any additional charges against a juvenile in those jurisdictions. The other group holds that once the juvenile court transfers a juvenile to criminal court, the criminal court has jurisdiction over the person and the subject matter, which means that the criminal court may try lesser-included offenses and additional criminal charges arising out of the same set of facts, even though those charges were not first filed in juvenile

court. Because the Kansas court recognized that each of those other jurisdictions has statutes that are unique to the individual states, the value in looking to those cases would be to analyze the approach to the question rather than focusing on the result.

In reaching its conclusion, the Kansas court pointed out that prosecutions in Kansas are public matters brought in the name of the state and that the prosecuting attorney has total discretion in determining whether to prosecute, what charges to file, and whether to reduce charges. In West Virginia, that same authority rests in the hands of the prosecuting attorney. The prosecutor alone has the discretion to seek prosecution of a juvenile as an adult.⁴ Moreover, in West Virginia, and in Kansas, the hearing in which the court decides whether to transfer the juvenile to adult jurisdiction is not adjudicatory. "It is merely a preliminary process to determine the type of adjudicatory procedure to be carried out at a later date." *Randolph supra*.

In *Randolph* the Kansas court held:

The juvenile court is to make the judicial determination of whether a juvenile should remain within the province of the juvenile court and not to determine what charges the state can file. Once the juvenile court decides to waive jurisdiction pursuant to [Kansas statute] and the respondent appears in the criminal court as a defendant, the criminal court acquires personal and subject matter jurisdiction over the case. The criminal court can try any additional charges that might arise from the same set of facts that spawned the juvenile case.... The state does not have to return to juvenile court and again seek its waiver of jurisdiction. It is sufficient that the procedure starts in juvenile court.

The Kansas case and Kansas procedures are very similar to the Appellant's case and to the procedures and the role of the prosecuting attorney in West Virginia and, therefore, should have influential value in this Court's ruling in this appeal.

⁴ W.Va. Code §49-5-10 Waiver and transfer of jurisdiction: (a) Upon written motion of the prosecuting attorney...the court shall conduct a hearing....

Randolph was decided by the Kansas Court in 1994. Quite recently the Supreme Court of Rhode Island found *Randolph*, along with cases in other states, to be influential in a similar case that was also one of first impression for the Rhode Island Court. *State v. Day*, 911 A.2d. 1042 (R.I. 2006) Under the heading in the opinion entitled "Persuasive Authority" the court stated:

We begin by noting that we are not the first court to address this thorny issue, and although some authority exists to the contrary the *great majority of courts* faced with this question have held that prosecutors may charge a child who is waived from juvenile court jurisdiction with any crime that arises from the conduct for which the waiver was sought⁵. (Emphasis added.)

The Rhode Island Court quoted the Kansas Court in stating, "Although these cases involve our sister courts' interpretation of their own states' individual waiver statutes, 'their value is in showing their approach to the problem and not the result.' "

In *Rocha v. State* 506 S.E. 2d. 192, (Ga. 1998) the defendant contended that he was wrongly indicted as an adult on offenses not properly transferred by the juvenile court. Initially, delinquency petitions for five counts of aggravated assault were filed against Rocha, and his case was transferred to adult court. Subsequently, he was indicted on five counts of aggravated assault, two counts of possession of a firearm during the commission of a felony and one count of giving a false name to a law enforcement officer.

The Georgia Supreme Court held:

The concurrent jurisdiction of the superior court over capital felonies committed by juveniles must necessarily extend to related lesser crimes which are part of the same criminal action. To rule otherwise would be to bisect

⁵ Citing *Knotts v. State*, 686 So.2d. 431 (Ala.Crim.App. 1995); *People v. Hamilton*, 78 Ill.App.3d. 1031, 34 Ill.Dec. 358, 398 N.E.2d. 33 (1979); *Pharms v. State*, 477 N.E.2d. 334 (Ind.Ct.App. 1985); *State v. Randolph*, 19 Kan.App.2d. 730, 876 P.2d. 177 (1994); *Osborne v. Commonwealth*, 43 S.W.3d. 234 (Ky. 2001); *Johnson v. State*, 512 So.2d. 1246 (Miss. 1987); *State v. Davis*, 988 S.W.2d. 68 (Mo.Ct.App. 1999); *State v. Garcia*, 93 N.M. 51, 596 P.2d. 264 (N.M. 1979).

criminal conduct artificially and require the state to follow two procedures with no substantive meaning other than to satisfy procedural requirements, with the end result that the case involving the lesser crime would be instituted in juvenile court and transferred to the superior court and the juvenile would still be tried for the lesser crime along with the crime giving the superior court concurrent jurisdiction. There is no loss of substantive protection of the juvenile, and the public's rights should not be impeded by meaningless procedural steps which delay the judicial process and conceivably could lead to the frustration of justice....

The Appellant cites *State v. Darden*, 12 S.W.3d. 455 (Tenn. 2000) in support of his position. However, even in *Darden*, the Supreme Court of Tennessee decided that additional charges for which the defendant was indicted after being transferred to the circuit court's jurisdiction were valid. The Appellant says that *Darden* is distinguishable because of certain language in the Tennessee transfer statute that gives the criminal court jurisdiction of all pending or subsequent charges after transfer has been ordered. Nonetheless, the charges against Darden all arose out of the same criminal conduct, i.e., the Tennessee court was not addressing a case in which Darden had committed an entirely separate offense that had not been the subject of transfer proceedings. Therefore, it would be wrong to over-interpret the *Darden* opinion as having no useful application to the Appellant's case.

The Appellant was transferred to adult status pursuant to W.Va. Code §49-5-10(d)(2). The criteria for transfer under that section of the law requires the defendant to have been previously adjudicated delinquent for an offense of felony violence to the person, and that the new offense be one of felony violence to the person. Those requirements were met by the fact that the defendant had been previously adjudicated delinquent as a juvenile for the offense of first degree robbery with a firearm, and that the new offense was characterized by the evidence of the violent attack on a man, as set forth in the Statement of Facts above.

Clearly, the Appellant was not transferred to adult jurisdiction only because he was facing a single charge of first degree robbery. The code section under which the Appellant was transferred to criminal court required the State to show by clear and convincing evidence that, not only was the Appellant feloniously violent to a human being on the occasion of February 12, 2005, but that he had been adjudicated for felonious violence to a human being at an earlier time. Therefore, it is correct to construe that the Appellant was transferred to adult jurisdiction because he was no longer a suitable candidate for the juvenile jurisdiction of the court. Accordingly, transferring the Appellant to the criminal court's jurisdiction transferred not only the subject matter (the delinquent/criminal conduct) but the person (the Appellant.)

In fact, when considered in its entirety, the juvenile transfer statute makes it plain that *both* the juvenile and the charged conduct are to be considered by the court in the transfer decision. For example, even the mandatory transfer section, dealing with the most serious conduct a juvenile can commit, requires the juvenile to be at least fourteen years of age for mandatory transfer to take effect. If a juvenile is under fourteen years old, many other factors must be taken into account by the court before transferring the young juvenile to adult court.

Under another of the transfer subsections the juvenile court must meet the requirements of determining not only the seriousness or the nature of the delinquent conduct, but the age of the juvenile and the prior adjudicated delinquent history of the juvenile. In yet another transfer subsection the court looks at conduct, plus age, plus past history, plus failure of prior rehabilitative efforts in the juvenile system, plus lack of parental, social and environmental support. This statutory scheme makes it apparent that, for juvenile transfer proceedings, the court is not considering solely the specific criminal/delinquent conduct allegedly committed by the juvenile, as the Appellant argues. Therefore, once transfer to adult status is ordered, the

criminal court acquires not only jurisdiction over the subject matter (the crime) but over the juvenile himself. When the juvenile becomes an adult for purposes of prosecution of his criminal conduct, the State and the criminal court are obligated to follow the rules of criminal procedure, including rules of mandatory joinder of offenses arising out of the same event or course of conduct.

It is worth noting that subsection (j) in W.Va. Code §49-5-10 refers to “a *juvenile* who has been transferred to criminal jurisdiction.... (Emphasis added). That language certainly permits this Court to translate West Virginia’s juvenile transfer statute as the majority of state courts have interpreted their own statutes.

Moreover, §49-5-2 – Juvenile jurisdiction of circuit courts – says in subsection (f) that a delinquent may remain under the jurisdiction of the juvenile court until age twenty-one. However, part (f) includes this language: this authority does not preclude the court from exercising *criminal jurisdiction* over the person if...*the proceedings have been transferred to the court’s criminal jurisdiction pursuant to [§49-5-10.]* (Emphasis added.)

The Appellant argues that the language in subsection (a) of §49-5-10 supports his argument that only the delinquency charge set forth in the juvenile petition, upon which the juvenile is transferred to criminal court, is permitted to be presented for indictment. The Appellant refers to the language in §49-5-10(a) which says a transfer motion “is to state, with particularity, the grounds for the requested transfer....” However, that sentence, more fully stated, is that the motion is to “state with particularity the grounds for the requested transfer, including the grounds relied upon as set forth in sections (d), (e), (f) or (g) of this section....” Those are the subsections that require the Court to consider a variety of information about the juvenile, including age, prior juvenile delinquency and the nature of the delinquency, prior

efforts to rehabilitate the juvenile in the juvenile system, and the juvenile's physical condition, maturity, emotional attitude, home or family environment, school experience and similar "personal" factors. Clearly, although the court is certainly considering the charged juvenile conduct, the court is also considering the juvenile himself in the transfer decision.

At the Appellant's transfer hearing, the prosecution presented evidence regarding all of the conduct committed by the Appellant and his co-delinquents, including the severe physical assault by knocking the victim to the ground and repeatedly beating, kicking and stomping him, their rifling through his pockets for property or valuables, their flight together from the scene, their actions in attempting to evade apprehension by police, and their efforts to destroy physical evidence. That is the conduct that supported the indictment and convictions for first degree robbery, malicious assault and the conspiracy among the assailants to commit those offenses. If there were a separate transfer hearing for malicious assault the evidence would be precisely the same, no more, no less, and transfer for that conduct of felonious violence to the person would also have supported this Appellant's transfer, even without the robbery by violence.

Because the conduct for which the Appellant was transferred to adult status encompassed the charges in the indictment, there should be no statutory bar interpreted to prohibit the additional charges that were included in the Appellant's indictment.

The Appellant cites *Gibson v. State*, 177 N.W.2d. 912 (Wis. 1970) in support of his argument that a juvenile court can only waive its jurisdiction with respect to charges of delinquency that are actually before it. *Gibson* is easily distinguishable, however. In that case the juvenile was charged with two separate armed robberies in two separate counties. One county had waived juvenile jurisdiction over the defendant and the other had not. The

Appellant's case is entirely different in that the separate charges in his indictment arose from the same criminal episode within Monongalia County.

Moreover, even with those highly distinguishable facts, the Rhode Island court in the *Day* case, *supra*, described *Gibson* as an "outlier with respect to the weight of authority in this country on juvenile waiver." In *Day* the court was addressing the very same question presented to this Court: whether, after waiver has been granted, the charges brought against a juvenile in the criminal court must be precisely aligned with the charges set forth in the court's waiver order. It appears from *Day* that the Rhode Island juvenile transfer statute bears great similarity to the West Virginia statute in terms of the spectrum of factors to be considered by a court at a transfer proceeding. Those factors include whether the heinous nature of the juvenile's conduct by itself is sufficient for transfer, or whether the nature of the juvenile's act in addition to past behavior and treatment in the juvenile system indicate that the juvenile is not amenable to the rehabilitative alternatives of juvenile court. As indicated previously, the Rhode Island court held that there is nothing in its statutory scheme to restrict the prosecutor from bringing charges against the juvenile in criminal court, which are different from those that served as the basis for waiver, provided that the new charges arise from the same "nucleus of operative facts." *Day*, *supra*. That ruling can be correctly applied by this Court to the Appellant's claim.

The Appellant also cites *Blythe v. State*, 268 Ind. 97, 373 N.E.2d. 1098 (1978) in support of his claim of error. *Blythe*, too, is easily distinguishable from the Appellant's case. The Appellant states that in *Blythe*, the juvenile was *transferred* to adult jurisdiction on a charge of felony murder (first degree murder) and subsequently entered a plea of guilty to second degree murder. The Indiana court held that the trial court lacked subject matter jurisdiction to accept the guilty plea because the charge differed from the initial charge.

When one carefully reads *Blythe*, it is clear that the juvenile was *first* charged by indictment in adult court based upon the statute in effect at the time that permitted a child over sixteen years of age who had committed a violation of law, which if committed by an adult, would be a capital offense. Therefore, a juvenile transfer proceeding was not held on the initial charge of first degree murder because it was not required. Such was not the case in the Appellant's case.

In *Blythe*, the Indiana court held that, although the criminal court had jurisdiction to have proceeded upon the first degree murder indictment, it was divested of adult jurisdiction when the theory of the state's case changed from first degree felony murder to second degree murder. One of the factors that court considered in its decision was that the court had previously held that second degree murder was not necessarily a lesser-included offense in felony murder. Although that court reached the conclusion summarized here, the court also recognized the redundancy required by its decision and the potential for double jeopardy problems. However, that court interpreted the Indiana statute as warranting the outcome.

The *Blythe* court summed up its decision by stating, "...[I]t is difficult to envision that our decision will benefit the defendant, while putting the state to the trouble and expense of further proceedings." Certainly, there is nothing in the West Virginia juvenile transfer statute to require this Court to rule for the Appellant by applying a tortured interpretation of our statute in order to come into line with an anomalous 1978 case, the outcome of which falls within a small minority of decisions.

CONCLUSION

The State is of the opinion that caselaw in other jurisdictions, as well as sound legal analysis of the language, purposes and goals of the West Virginia juvenile transfer statute, and consideration of constitutional due process rights, both substantive and procedural, all support a finding by this Court that once the juvenile court transferred this Appellant to adult status, the criminal court acquired both personal and subject matter jurisdiction over the case, including any related offenses that were supported by the evidence of the Appellant's criminal activity, and that arose out of that same criminal activity. To rule otherwise would be to exalt form over substance, without providing any greater protection of the Appellant's rights than those that have been afforded to him.

Accordingly, the State asks this Court to deny the appeal and to uphold the lower court's decision on juvenile transfer and thereby to uphold the Appellant's convictions on all counts.

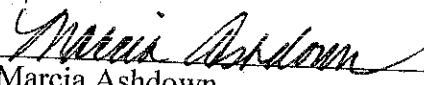
Respectfully Submitted,



Marcia Ashdown
Monongalia County Prosecuting Attorney
Appellee

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing Response upon Mr. Bader C. Giggenbach and Ms. Raelynn Regula, by first class mail on February 15, 2008.



Marcia Ashdown